IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 385

WILLIAM JEFFRIES, JR., CHARLES R. AIKEN, administrator *de bonis non* of the estate of William Jeffries, deceased, DRAPER AND KRAMER, INCOPORATED, a corporation, and CHICAGO TITLE AND TRUST COMPANY, a corporation, as Trustee, etc.,

Petitioners,

vs.

NELLIE JEFFRIES and HARPER FRENCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners,

VS.

NELLIE JEFFRIES and HARPER FRENCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

Your petitioners respectfully represent as follows:

I.

Matter Involved.

Respondent Harper French, a citizen of Michigan, filed his complaint in the District Court for Northern Illinois against respondent Nellie Jeffries and the petitioners, all citizens of Illinois, seeking to establish a half interest in a deceased's property stated to have a value of $100,000 (Tr. 2-12). The widow filed a countercomplaint claiming sole ownership under trusts of the decedent's estate (Tr. 19-50).

At the trial the plaintiff admitted under cross examination that his claims were fabricated and were made in an attempt by him to defraud the estate (Tr. 184).

The chancellor dismissed the complaint and the countercomplaint for want of equity (Tr. 113-126).

The widow appealed contending the plaintiff's admission that his claims were meritless ousted the court of jurisdiction and that her countercomplaint should, therefore, have been dismissed for want of jurisdiction instead of for want of equity (Tr. 146-147). The administrator moved to dismiss the appeal as moot (Tr. 268).

The court of appeals ignored the motion to dismiss the appeal and ordered the cause dismissed for want of jurisdiction, holding (Tr. 233):

> "Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such a claim is incapable of supporting the jurisdiction of the court."

II.

Jurisdictional Basis.

A.

Issuance of the writ of certiorari upon this record is authorized by section 240 of the Judicial Code (28 U. S. C., sec 347a).

The judgment sought to have reviewed was rendered by the Circuit Court of Appeals for the Seventh Circuit upon appeal from the District Court of Northern Illinois. Section 240 of the Judicial Code provides in pertinent respects: "In any case, civil or criminal, in a circuit court of appeals, . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari . . . that the cause be certified to the Supreme Court for determination by it . . ."

B.

The judgment presented for review was rendered by the court of appeals on May 7, 1945 (Tr. 235). The reviewing court below denied a timely petition for rehearing on June 14, 1945 (Tr. 275). This petition with supporting brief and record having been filed with the clerk within three months after June 14, 1945, the application is made in time. (*National Labor Relations Board* v. *Mackay Radio Co.*, 304 U. S. 333.)

III.

Questions Presented.

A.

When a false demand is asserted solely for the claimant's gain and without any purpose of creating a case within the federal jurisdiction, does ascertainment of the lack of merit in the complaint oust the federal jurisdiction and require the court to dismiss the cause for want of jurisdiction instead of on the merits? Or, in other words, where a claim is unfounded and a fraud upon the parties sued, does that fact, alone, in the absence of collusion or conspiracy to frame a case cognizable in the federal court, preclude the court from denying the fictitious demand?

B.

Does the Judicial Code require the trial court to peremptorily dismiss a complaint for want of jurisdiction as soon as there is any indication that the claim was concocted for invocation of the federal jurisdiction, or is it necessary for the proper exercise of the court's discretion to await such time as the facts create a legal certainty that the suit does not fairly involve a controversy within its jurisdiction?

C.

Is a party who has affirmatively invoked the jurisdiction of a federal court by filing a counterclaim estopped from challenging that jurisdiction solely in order to avoid an unfavorable ruling?

D.

May a court of appeals set aside a judgment not appealed from and, therefore, not before it, because the record presented upon an appeal from a different judgment contains all of the proceedings on which the unappealed judgment is based?

E.

May a reviewing court in the face of a motion to dismiss the appeal as moot upon a record which presents no actual controversy involving real and substantial rights between the parties pass upon a question of the trial court's jurisdiction?

F.

May a Circuit Court of Appeals in reviewing a case coming from the District Court finally determine and dispose of the cause in the upper court, or must the cause be remanded to the trial court for further proceedings?

G.

Can a court of appeals discharge its appellate function on the review of a decree in chancery by rewarding her whom it has found guilty of fraud?

IV.

Reasons for Allowing the Writ.

The following special and important reasons for exercise of the Court's discretionary consideration are presented upon this record:

A.

The court of appeals decided a federal question in a way that conflicts with an applicable decision of this court.

The reviewing court below ordered the cause dismissed for want of jurisdiction because the plaintiff's claim was found to be fictitious but not asserted to create federal jurisdiction. The court concluded:

> "Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such a claim is incapable of supporting the jurisdiction of the court."

This Court has held that to warrant dismissal for want of jurisdiction under section 37 of the Judicial Code the claim must not only be without merit but in addition must have been asserted for the purpose of conferring jurisdiction on the federal court. In *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, the following test was laid down (p. 289):

> "If, from the face of the pleadings it is apparent to a legal certainty that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable *for the purpose of conferring jurisdiction, the suit will be dismissed.*" (Italics supplied.)

B.

The court of appeals decided a federal question in a way that conflicts with applicable decisions of this Court.

The reviewing court below held that the moment it appeared to the Master or the District Court that the claim was faked the cause should have been allowed to proceed

no farther and ought to have been summarily dismissed for want of jurisdiction. The Court said:

> "When the Master and the District Court saw that it was a fake suit, it was the Master's duty to recommend dismissal, and the Court's duty to dismiss the case."

In *Wetmore* v. *Rymer*, 169 U. S. 115, this Court held (p. 128):

> "A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction unless the facts when made to appear on the record *create a legal certainty of that conclusion.*"

To the same effect see: *Put-in-Bay Waterworks Co.* v. *Ryan*, 181 U. S. 409, 430; *Smithers* v. *Smith*, 204 U. S. 632, 644, 646; *Barry* v. *Edmunds*, 166 U. S. 550, 559.

C.

The ruling of the court of appeals is in conflict with the decision of another circuit on the same matter.

In its opinion the court below stated:

> "Nellie Jeffries answered the complaint, admitting that French was a citizen of Michigan, and she filed a countercomplaint in which she alleged she was the owner of the property of which deceased died siezed . . . At the conclusion of the first testimony taken, which was that of the plaintiff Harper French, counsel for Nellie Jeffries, . . . insisted on dismissal of the complaint for want of jurisdiction . . . Nellie Jeffries appealed . . . The question of jurisdiction was raised at the trial, in the briefs, and on the oral argument."

It was urged by the appellees in the court of appeals that Nellie Jeffries by affirmatively invoking the jurisdic-

tion of the District Court was estopped from contesting that jurisdiction. This contention was totally ignored. Instead, the reviewing court merely observed, although all parties had conceded the elementary proposition:

> "It hardly needs the citation of authority to support the proposition that the parties cannot stipulate to waive jurisdiction or by their consent can confer jurisdiction."

The Second Circuit Court of Appeals in *O. J. Lewis Mercantile Co.* v. *Klepner*, 176 Fed. 343, held as follows upon precisely the same question (p. 346):

> "The defendant interposed a counterclaim, and having invoked the jurisdiction of the court for its own benefit is now estopped from denying it."

This Court denied certiorari in the *Klepner case* (216 U. S. 620), and cited the decision with approval in *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283.

D.

The ruling of the court of appeals is in conflict with the decisions of other circuits on the same matter.

The reviewing court below found in its opinion:

> "The District Court considered the case on its merits and found against French on his complaint and Nellie Jeffries on her countercomplaint. Nellie Jeffries appealed."

The decree dismissing the plaintiff's complaint for want of equity was not appealed and was not before the court of appeals for determination. Yet, the reviewing court ordered such judgment dismissed for want of jurisdiction instead of for want of equity.

The Circuit Court of Appeals held in *Bass* v. *B. & O. Term. R. Co.*, 142 F. 2d 779, 781:

> "We cannot review an order from which no appeal has in fact been taken."

To like effect see *Brady* v. *Bernard & Kittinger*, 170 Fed. 576, 581; *Greif* v. *Mullinix*, 264 Fed. 391, 394.

E.

The court of appeals decided a federal question in a way that conflicts with an applicable decision of this Court.

Appellees in the court below pointed out there that each claim asserted by the appellant had been adversely decided in the State courts and that the appeal involved no real or substantial rights. A motion was made to dismiss the appeal as moot.

The court of appeals ignored the motion to dismiss, thus in effect denying it.

This Court held in *Mills* v. *Green*, 159 U. S. 651, 653:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

F.

The court of appeals decided a federal question in a way that conflicts with applicable decisions of this Court.

The court below disposed of the appeal in the following manner:

> "The suit did not ' . . . really and substantially involve a dispute or controversy properly within the jur-

> isdiction of said district court . . .' as required by statute. 28 U. S. C. A. 80 . . . It is our duty where the District Court so fails to dismiss for want of jurisdiction and proceeds to dismiss on the merits, to dismiss the case . . . The case is dismissed for want of jurisdiction."

In *Piedmont & Nor. Ry.* v. *United States,* 280 U. S. 469, this Court ruled (p. 478):

> "Since plaintiff's bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction."

G.

The ruling of the court of appeals is in conflict with the decisions of another circuit on the same matter.

The court below found that Nellie Jeffries, the appellant there, "conspired with Bruseaux to get French to file this fake suit . . . She is a part of the fraud."

The only practical effect of the decision below is to permit Nellie Jeffries to escape the bar of the decree denying her various claims of ownership and permit her to refile her suit in another court. Thus, the only party benefited by the decision on appeal is she whom the reviewing court found guilty of fraud.

The Second Circuit Court of Appeals held in *O. J. Lewis Mercantile Co.* v. *Klepner,* 176 Fed. 343, 344:

> "No serious contention based upon the merits can be urged . . . This fact coupled with the additional fact that the litigation has already extended over a period of more than six years involving three trials and two appeals, predisposes the court not to dismiss the cause upon a doubtful question of jurisdiction."

Prayer.

Wherefore, the petitioners pray that a review of the decision by the circuit court of appeals in this cause may be granted and the writ of certiorari ordered to issue for that purpose.

Respectfully submitted,

CHARLES RIVERS AIKEN,
Counsel for Petitioners.

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NO.

WILLIAM JEFFRIES, JR., CHARLES R. AIKEN, administrator *de bonis non* of the estate of William Jeffries, deceased, DRAPER AND KRAMER, INCOPORATED, a corporation, and CHICAGO TITLE AND TRUST COMPANY, a corporation, as Trustee, etc.,

Petitioners,

vs.

NELLIE JEFFRIES and HARPER FRENCH,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Opinion.

The opinion rendered in this cause by the Circuit Court of Appeals for the Seventh Circuit is set forth in full at pages 230 to 234 of the transcript, and is reported, not,

however, with complete accuracy, in volume 149 of the Federal Reporter, second series, at page 555 (*French* v. *Jeffries*, 149 F. 2d 555).

Jurisdiction

The judgment sought to have reviewed was entered by the court of appeals on May 7, 1945, and a rehearing in that court was denied June 14, 1945 (Tr. 235, 275). This application is made within the statutory period of three months thereafter.

A full statement of the jurisdictional basis is set out in the petition proper (*ante* p. 3).

Statement of the Case.

Respondent Harper French, a citizen of Michigan, filed his complaint in the District Court for Northern Illinois against the respondent Nellie Jeffries and the petitioners, all citizens of Illinois (Tr. 2-3). French asserted he was a half brother of William Jeffries, deceased, and through such kinship and an express trust he was entitled to a half interest in the decedent's estate, alleged to be worth more than one hundred thousand dollars, then being administered in the Probate Court of Cook County, Illinois (Tr. 2-12).

Joined as parties defendant to the complaint in equity were the widow and the only child of the deceased, his administrator and the management agents of the personal representative, and the trustee of title to the decedent's property (Tr. 2). All of the defendants answered, and the widow upon leave filed a countercomplaint claiming she was the sole owner of the estate assets by virtue of several trusts and because of defects in certain assign-

ments of the property (Tr. 19-50). By her countercomplaint the widow asked that the administrator turn over the estate assets in his hands as her individual property, that the State proceedings be perpetually enjoined, and that a full accounting of the administration be made (Tr. 47-50).

At the hearings before the Master, French admitted under cross examination that he was not actually related to the deceased, they having merely grown up as orphan boys together, and that his claims of trust were false (Tr. 184). More than a thousand pages of the transcript were thereafter taken up with evidence introduced by the widow in an effort to sustain her various claims of ownership (Tr. 185-209). Proof was also taken under a counterclaim filed by the son for fraud and deceit committed in the attempts by the parties to deprive him of his inheritance (Tr. 217-219).

By a final decree rendered June 23, 1944, the chancellor dismissed the complaint and the counterclaims for want of equity (Tr. 113-126). The widow prosecuted an appeal from the dismissal of her countercomplaint (Tr. 42). No appeal was taken from the decree dismissing the complaint or from the decree dismissing the son's counterclaim.

Upon review, the principal question presented by the widow for determination in the court of appeals was, as stated by her (Tr. 146-147):

> "Did the court obtain jurisdiction of the above entitled cause by reason of the false and fraudulent claim of Harper French, who claimed at one time to be a resident of Detroit and at a later date a resident of Chicago, and who admitted that he was not a brother of William Jeffries and that he did not have a claim for any sum or sums whatsoever against the Estate and that the suit was filed by fraud?"

At the hearing in the court of appeals the administrator moved to dismiss the appeal as moot on the ground that all questions of substance presented by the appellant had been finally and conclusively adjudicated against her by other courts of competent jurisdiction (Tr. 268).

By its opinion handed down May 7, 1945 (Tr. 230), the court of appeals ignored the motion to dismiss the appeal and ordered the cause dismissed for want of jurisdiction (Tr. 234). The court found in this respect as follows (Tr. 230-234, 245):

> "The evidence shows that Harper French never had any cause of action of any kind . . . The claim asserted by French was a fraud and had no existence whatever in fact. He had no claim of any kind against any one he sued . . . The case just did not exist and was filed fraudulently, the result of the scheme to defraud the estate of William Jeffries, Sr."

In ordering the dismissal for want of jurisdiction, the court of appeals held (Tr. 233):

> "Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such claim is incapable of supporting the jurisdiction of the court."

The reviewing court below disposed of the appeal in the following manner (Tr. 234):

> "The case is dismissed for want of jurisdiction."

Errors Relied On.

A.

The court of appeals erred in ordering the cause dismissed for want of jurisdiction instead of for want of equity merely because the plaintiff's claim had no existence in point of fact and was intended to defraud the defendants.

B.

The court of appeals erred in holding that a cause must be dismissed by the District Court the moment there is any indication that the plaintiff's claim is fictitious.

C.

The court of appeals erred in permitting a party who invoked the court's jurisdiction by filing a counterclaim to question the jurisdiction solely to avoid an unfavorable ruling.

D.

The court of appeals erred in setting aside a judgment which had not been appealed and was not before the reviewing court.

E.

The court of appeals erred in dismissing a cause for want of jurisdiction without deciding a motion by one of the appelles to dismiss the appeal as moot.

F.

The court of appeals erred in finally disposing of the cause in the reviewing court by dismissing the case for want of jurisdiction instead of reversing the judgment and remanding the cause to the District Court for further proceedings.

G.

The court of appeals erred in rewarding a party it had found guilty of fraud.

ARGUMENT.

May It Please The Court:

A.

Falsity Alone Is Not Sufficient To Justify Dismissal Of Claim For Want Of Jurisdiction.

It was not contended, nor was it found, that the complaint of Harper French had been filed for the purpose of creating a case within the federal jurisdiction. The court of appeals ordered the case dismissed for want of jurisdiction instead of for want of equity solely because the plaintiff had admitted his claim was fictitious. The court below held:

> "Where the claim asserted by the plaintiff has no existence in point of fact and is fraudulently asserted in a complaint, such a claim is incapable of supporting the jurisdiction of the court."

This conclusion of the court below is in conflict with repeated holdings of this Court that before a trial court may dismiss a cause under the statute for want of jurisdiction it must be found that the case was framed for the purpose of invoking the federal jurisdiction.

The most recent expression to this effect is found in *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, where the Court defined the rule to be as follows (p. 289):

> "If from the face of the pleadings it is apparent to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never

> was entitled to recover that amount, *and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.*" (Italics supplied.)

The decision below is the first time it has ever been held that falsity alone, without any purpose of creating a case cognizable in the federal court, is sufficient to require dismissal of the complaint for want of jurisdiction. Such doctrine, if approved, will open the door to much abuse and difficulty.

Under the ruling in the instant case all a losing litigant need do to escape the bar of an adjudication on the merits is to concede that his claim is false. Such a development, according to the decision at bar, requires that the trial court forthwith, without proceeding farther, dismiss the cause for want of jurisdiction.

B.

Summary Dismissal For Want Of Jurisdiction Is Proper Only When Facts Create A Legal Certainty.

The court of appeals has unfairly reflected upon the master and the chancellor for failing to dismiss this cause the moment the plaintiff admitted that his claim was without merit. In this respect the court held:

> "When the Master and the District Court saw that it was a fake suit, it was the Master's duty to recommend dismissal, and the Court's duty to dismiss the case."

The violent conflict between the ruling at bar and the holdings of this Court on the same subject is perhaps best illustrated by *Barry* v. *Edmunds,* 166 U. S. 550, 559:

> "It might happen that the judge, on the trial or

> hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account 'shall appear to the satisfaction of said circuit court.' "

In *Wetmore* v. *Rymer*, 169 U. S. 115, this Court said (p. 128):

> "A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction unless the facts when made to appear on the record *create a legal certainty of that conclusion.*"

The Court employed language in deciding the case of *Put-In-Bay Waterworks Co.* v. *Ryan*, 181 U. S. 409, which applies with much force to this case. The Court said there (p. 430):

> "Our impression of this record has not constrained us to hold that the Circuit Court lost its apparent jurisdiction of the case by reason of disclosures made subsequently in the progress of the case . . . Within the letter of the statute there was a controversy between citizens of different States in which the matter in dispute was over the sum or value of two thousand dollars."

After setting forth the provisions of section 37, the Court went on to say (p. 430):

> "And it has been several times decided by this court that a suit cannot properly be dismissed by a circuit

court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts when made to appear on the record, *create a legal certainty of that conclusion.*

"It is not clearly shown in this report that, at any time after the suit was brought it was made to appear, *to the satisfaction of the Circuit Court,* that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

In *Smithers* v. *Smith,* 204 U. S. 632, the District Court dismissed the cause under section 37 after finding that the plaintiff had fraudulently stated his claim "for the purpose of conferring jurisdiction upon the court". This Court reversed the judgment with the following observations (pp. 644, 646):

"We know of no case that holds that in such a situation the judge of the circuit court is authorized to interpose and try a sufficient part of the controversy between the parties to satisfy himself that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value, and we think that by sound principle he is forbidden to do so . . . In deciding that the defendants had not acted jointly, as the plaintiff alleged and the defendants denied, he determined not a jurisdictional fact but an essential element of the merits of the dispute upon which the parties were at issue."

C.

A Counterclaimant Is Estopped From Challenging Jurisdiction of the Complaint.

Nellie Jeffries obtained leave from the District Court to file her countercomplaint. When the chancellor denied her

claims for want of equity, she complained on appeal that the court lacked jurisdiction.

The appellees in the court of appeals urged that Nellie Jeffries was estopped from challenging the jurisdiction having invoked the jurisdiction by her countercomplaint. This point was completely ignored by the reviewing court thus effectually denying it.

In permitting Nellie Jeffries to attack the trial court's jurisdiction upon this record, the opinion below is in conflict with a decision of the Second Circuit on the same matter. In *O. J. Lewis Mercantile Co.* v. *Klepner,* 176 Fed. 343, the principal contention was, as here, that the complaint should have been dismissed for want of jurisdiction. The court held in the *Klepner case* (p. 346):

> "The defendant interposed a counterclaim, and having invoked the jurisdiction of the court for its own benefit is now estopped from denying it."

This Court denied certiorari in the *Klepner case* (216 U. S. 620), and the decision was cited with approval in the recent case of *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283.

D.

A Court Of Appeals Cannot Review A Judgment That Is Not Before It..

The proceedings in the District Court were made up of three separable controversies: (1) French's claim against the estate; (2) Nellie Jeffries' claim against the estate; and, (3) the claim of William Jeffries, Jr., against French and Nellie Jeffries. By its definitive decree the District Court dismissed each of these claims for want of equity.

The dismissals of French's complaint and of the counterclaim by William Jeffries, Jr., were not appealed and were, therefore, not brought before the court of appeals for determination.

Nellie Jeffries appealed, as she might, only from those orders or judgments which were adverse to her. However, the record submitted with her appeal included all of the proceedings had in the trial court.

Nellie Jeffries in her briefs prayed for the following relief:

> "The decree of the District Court should be reversed and remanded with directions to dismiss the complaint of the plaintiff and the countercomplaint without prejudice for want of jurisdiction and that the said cause be transferred to the Circuit Court or Superior Court for hearing."

The court of appeals assumed it had jurisdiction to rule upon the decree dismissing plaintiff's complaint for want of equity, and directed its dismissal for want of jurisdiction.

The Federal Reporter describes the appeal in this case as follows (*French* v. *Jeffries*, 149 F. 2d 555, 556):

> "*From a judgment against plaintiff on his complaint* and against named defendant (Nellie Jeffries) on her countercomplaint, named defendant appeals.
>
> "Case dismissed for want of jurisdiction."

In thus reviewing the decree dismissing plaintiff's complaint for want of equity, the court passed upon a judgment not before it and over which it, therefore, could exercise no power or control. In passing, therefore, upon the decree which dismissed Nellie Jeffries' countercomplaint, the

attack upon jurisdiction was collateral and the challenge as to the findings of jurisdictional facts was thereby precluded.

This Court in *Reed* v. *Allen*, 286 U. S. 191, said (p. 198):

> "It is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment."

In *Bass* v. *B. & O. Term. R. Co.*, 142 F. 2d 779, the court said (p. 781):

> "We cannot review an order from which no appeal has in fact been taken."

The holding of *Brady* v. *Bernard & Kittinger*, 170 Fed. 576, would seem to be decisive here (p. 581):

> "The rule which appellants seek to invoke, that an appellate court will remand a cause with instructions to dismiss whenever it appears from the record that there was no jurisdiction in the court below, has no application except where such want of jurisdiction affirmatively appears upon the face of the record in a case otherwise properly before the appellate court . . . And the appellate court has no jurisdiction to so remand where the alleged want of jurisdiction in the court below is predicated upon an issue of fact adjudicated in the court below in favor of the jurisdiction, and where the order or judgment in which such adjudication was involved is not properly before the appellate court for review."

E.

An Appellate Court May Not Decide Merely Moot Questions.

Each of the claims of trust and defective assignments advanced by Nellie Jeffries in her countercomplaint had

previously been adjudicated against her in the Circuit and Superior Courts of Cook County, Illinois, the only other courts having jurisdiction. The administrator at the hearing in the court of appeals pointed out the absence of any actual controversy between the parties involving real and substantial rights, and moved to dismiss the appeal as moot.

Here, again, the court of appeals refused to notice the point thereby denying the motion.

This Court passed upon a similar contention in *Mills* v. *Green*, 159 U. S. 651, saying (p. 653):

> "The defendant moved to dismiss the appeal, assigning as one ground of his motion 'that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this court can operate.'
>
> "We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.
>
> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

F.

When Dismissal For Want Of Jurisdiction is Ordered, Court Of Appeals Must Remand Cause For Further Proceedings.

Disposition of the cause in the court of appeals is made in the following manner:

> "It is our duty, where the District Court so failed to dismiss for want of jurisdiction and proceeds to dismiss on the merits, to dismiss the case . . . The cause is dismissed for want of jurisdiction."

The section of the Judicial Code under which the court of appeals attempted to act in dismissing the cause provides in pertinent respects as follows (28 U. S. C. 80):

> "If in any suit commenced in a district court . . . it shall appear to the satisfaction of the said district court . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court . . . *the said district court shall . . . dismiss the suit.*"

Section 877 of the Judicial Code provides as follows (28 U. S. C. 877):

> "Whenever on appeal or writ of error or otherwise a case coming from a District Court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, *such cause shall be remanded to the said district court for further proceedings* to be there taken in pursuance of such determination."

Obviously the opinion of the court below dismissing the cause for want of jurisdiction is in direct violation of the command of the statute. Under the act the judgment must be reversed and remanded to the District Court for further proceedings. As the record stands now, the decree has not been reversed.

Disposing of such an appeal the Court said in *Piedmont* v. *Nor. Ry.* v. *United States,* 280 U. S. 469, 478:

> "Since plaintiff's bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction."

G.

A Court Of Equity, Either Trial Or Appellate, Should Not Reward A Party It Finds Guilty Of Fraud.

The court of appeals has found Nellie Jeffries a principal conspirator in the fraudulent assault upon the estate. Then it determines her appeal in a way which has as its only practical effect the benefiting of Nellie Jeffries. In other words, the court below does equity by rewarding her who is guilty of fraud.

It is conceded that the various claims advanced against the estate by Nellie Jeffries are devoid of merit. In *O. J. Lewis Mercantile Co.* v. *Klepner,* 176 Fed. 343, the Second Circuit Court of Appeals held (p. 344):

> "No serious contention based upon the merits can be urged . . . This fact, coupled with the additional fact that the litigation has already extended over a period of more than six years involving three trials and two appeals, predisposes the court not to dismiss the cause upon a doubtful question of jurisdiction."

Respectfully submitted,

CHARLES RIVERS AIKEN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 385

WILLIAM JEFFRIES, JR., CHARLES R. AIKEN, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WILLIAM JEFFRIES, DECEASED, DRAPER AND KRAMER, INCORPORATED, A CORPORATION, AND CHICAGO TITLE AND TRUST COMPANY, A CORPORATION AS TRUSTEE, ETC.,

Petitioners,

vs.

NELLIE JEFFRIES AND HARPER FRENCH,

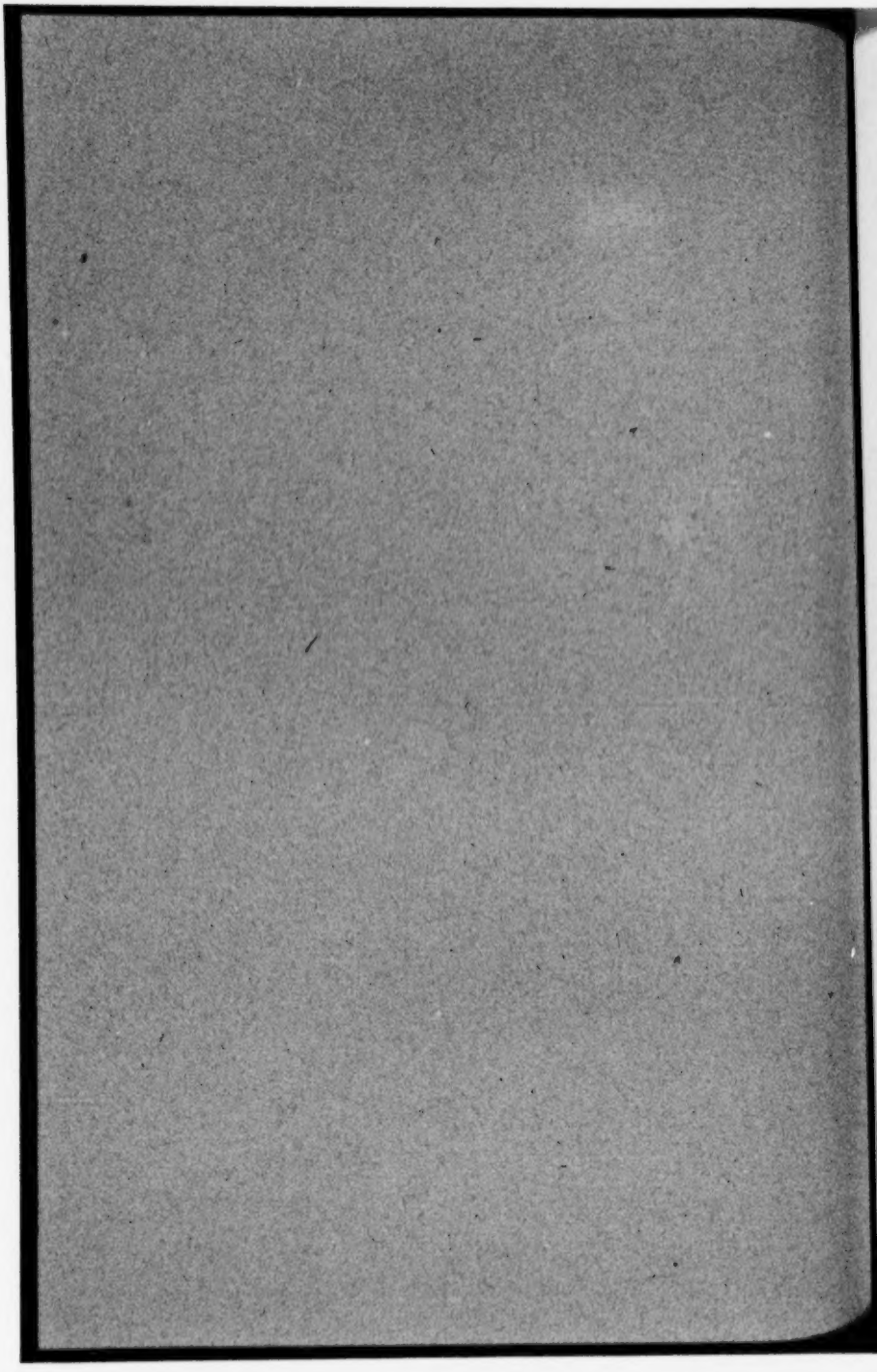
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. BECKMAN,
GEORGE C. ADAMS,
Attorneys for Respondent, Nellie Jeffries.

DANIEL M. HEALY,
CHARLES F. HOUGH,
Of Counsel.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 385

WILLIAM JEFFRIES, JR., CHARLES R. AIKEN, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF WILLIAM JEFFRIES, DECEASED, DRAPER AND KRAMER, INCORPORATED, A CORPORATION, AND CHICAGO TITLE AND TRUST COMPANY, A CORPORATION AS TRUSTEE, ETC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent urges that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Jurisdiction.

We concede the jurisdiction of this Court under the Certiorari Act to consider a petition for Writ of Certiorari.

I.

Matter Involved.

Harper French, a total stranger and a resident of Illinois or Michigan, filed a Complaint in the United States District Court for Northern Illinois against Nellie Jeffries, William Jeffries, Jr., Charles R. Aiken, administrator *de bonis non* of the Estate of William Jeffries, deceased, Draper & Kramer, and the Chicago Title and Trust Company, all of Chicago, Illinois, in which he pretended to be a half brother of the deceased and that he had loaned him $3,000 during his lifetime.

The matter was referred to a Master, and French abandoned his attorney, Ferguson, and appeared with Charles R. Aiken, administrator *de bonis non*, a defendant and attorney for William Jeffries, Jr., a defendant, and admitted fraud and collusion at the first hearing. French testified under oath that he was not a brother of the deceased, that he had not loaned the deceased $3,000, and was not interested in the estate in any way whatsoever and wanted the suit dismissed. Plaintiff's attorney, Ferguson, moved to dismiss the Complaint and Nellie Jeffries' attorney, Adams, moved to dismiss her Cross Complaint and to have the suit dismissed for want of jurisdiction, but defendant Aiken (who now represents plaintiff and defendants) objected, and the Master sustained the objection. (Rec. 272-274.)

The Master while passing upon the motion to dismiss observed: "The Master: Well, while we are on that

subject, I might make another observation. The Master, you know, lives by his fees here. What assurance am I going to have I am going to get my fees? The plaintiff is abandoning his case and the cross complainant is debating whether he would like to or not." (Rec. 270.) After receiving assurance from the administrator, Aiken, defendant and attorney for plaintiff and defendants, that his fees would be paid, the objection to dismissing the case was sustained. (Rec. 270.)

The Master accepted $2,500.00 as a fee from the administrator Aiken during the trial (Exhibit 2493), before the decree was entered fixing or allowing the same, after he made the above statement that he lived upon his fees and the administrator Aiken offered to pay him.

II and III.

Exercise of Jurisdiction.
Questions Presented, A to G.

We contend that the case at bar presents no circumstance which warrants the grant of certiorari in this cause:

(A) French, a total stranger or outsider, admitted that he was not a brother and had no claim when the suit was filed.

(B) The suit was filed as a fraud and collusion and should have been dismissed under the Statute (Chapter 3, Section 80, (Judicial Code Section 37), p. 578 of U. S. C. A. Title 28).

(C) No legitimate claim for $3,000 ever existed (*North Pacific, et al.* v. *Saley*, 275 U. S. 216).

(D) French and his attorney, Ferguson, moved to dismiss suit and Nellie Jeffries, cross complainant, by Adams, joined in the motion (Rec. 272-274).

(E) After the motion of the plaintiff and cross complainant was made, the Court wrongfully took under advisement their motion and permitted the defendant, William Jeffries, Jr., the right to file a pretended Counter Complaint to prevent the case from being dismissed. At that time Ferguson ceased to act as attorney for French and Aiken, defendant and attorney for the defendants, began to act as attorney for French, and advanced plaintiff French several large sums of money. (Rec. 1631-1716.)

(F) The burden of establishing jurisdiction of the Federal Court is upon the plaintiff and remains throughout the trial. Harper French, plaintiff, is not the petitioner.

(G) The petitioners, defendants, in the fraudulent and collusive suit cannot assume the burden of their co-conspirators, French, the plaintiff, of establishing jurisdiction in a case which he abandoned and admitted his fraud under oath while testifying for them. Jurisdiction as to amount and diversity of citizenship cannot be waived. The plaintiff did not have a claim for any amount when the suit was filed and he was a resident of Chicago.

The petition in the instant case does not present a question for review on writ of certiorari, as defined by Rule 38, 5 (a), (b), (c).

IV.

Answer of respondent to Petition and reasons relied upon for denial of the writ of certiorari.

(1) The petitioners admit on page 2 of the Petition and page 15 of the Brief that the suit was filed by fraud and collusion and the plaintiff had no legitimate

claim. The cases cited on page 6 (A) sustain the position of the respondent that the suit should have been dismissed.

(2) Answering A to G, respectively, the decision of the Circuit Court of Appeals for the Seventh Circuit is not untenable and is not in conflict with applicable decisions of this Court, and the citations of authorities, pages 6 to 10, respectively, sustain the position of the respondent, as will more fully appear in respondent's Brief.

The petition for certiorari should be denied.

BRIEF.

PROPOSITIONS OF LAW RELIED UPON.

I.

Jurisdiction.

The United States District Court was without jurisdiction because there was no bona fide claim for $3,000 or more, no diversity of citizenship, or no Federal Statute or Law involved, and the United States Circuit Court of Appeals was justified in its findings.

U. S. Annot. Stat. Sec. 41, Para. 1.

Baltimore, etc. v. *Larwill,* 93 N.E. 619; 34 L. R. A. (N. S.) 1195.

Edward Sales Co. v. *Harris Structual Steel Co.,* 17 F. (2d) 155.

Farmers, etc. Bank v. *Federal Reserve Bank,* 275 F. 235.

(A) The burden of establishing jurisdiction of the Federal Court is upon the plaintiff and remains through the trial.

McNutt v. *General Motors Accept. Corp.,* 298 U. S. at 178, 189.

Kvos v. *Associated Press,* 299 U. S. 269.

Handley-Mack Co. v. *Godcheaux Sugar Co.* (C. C. A. Tenn., 1924) 2F. (2d) 435.

(B) The jurisdiction of a Court of the United States as to amount and diversity of citizenship cannot be waived.

Pennsylvania v. *Williams*, 294 U. S. 176.

Gordon v. *Washington*, 295 U. S. 30, 35, 36.

(C) The plaintiffs in good faith in choosing a Federal form is open to challenge not only by resort to the face of the complaint, but facts disclosed at the trial, and if from either source it is clear that this claim never could have amounted to the sum necessary to give jurisdiction, the case will be dismissed.

St. Paul Mercury Indemnity Co. v. *Red Cap Co.*, 303 U. S. 283.

Operators Piano Co. v. *First Wisconsin Trust Co.*, 283 F. 904.

Hayward v. *Nordberg Mfg. Co.*, 85 F. 4.

(D) The case should be dismissed if the evidence shows fraudulent statement of value to give jurisdiction or that the plaintiff cannot legally be permitted to sustain his claim.

North Pac. S. S. Co. v. *Soley*, 257 U. S. 216.

Horst v. *Merkley*, 59 F. 502.

Simon v. *House*, 46 F. 318.

N. American Transport & Trading Co., 178 U. S. 262.

(E) The collusion and fraud in making of parties and claiming amounts to establish jurisdiction is ground for dismissing.

Coffin v. *Haggin*, 11 F. 224.

Lehigh Min. & Mfg. Co. v. *Kelly*, 160 U. S. 342.

Cilley v. *Patten*, 62 F. 500.

Hayden v. *Manning Southern Pacific Co.* v. *Eshelman,* 106 U. S. 588 (D. C. Calif. 1914) 227 F. 928.

Marvin v. *Ellis,* 9 F. 367.

(F) Under Judicial Code Section 24, 28 U.S.C.A. Section 41, filing of counterclaim by the defendant of a suit does not give the Court jurisdiction of the suit not involving jurisdictional amount.

Home Life Insur. Co. v. *Sipp,* 11 F. 2d 474.

Industrial & Mining Guaranty Co. v. *Electrical Supply Co.,* 58 F. 732.

(G) The jurisdiction of the Court was excluded by the pendency of an action in the Probate Court of Cook County and could not be waived even if the parties consented thereto.

Pac. Coast Pipe Co. v. *Conrad City Water Co.,* (D. C. Mont. 1916) 237 F. 673, affirmed 245 F. 846.

Primos Chemical Co. v. *Fulton Steel Corp.* (D. C. N. Y. 1918) 254 F. 454.

It is the duty of the Court, of its own motion, to dismiss a case, whenever it shall be made to appear that the facts upon which jurisdiction depends do not exist.

Horst v. *Merkley,* 59 Fed. 502.

Maxwell v. *Atchison, T. & S. F. R. R. Co.,* 34 Fed. 286.

BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction.

The Court was without jurisdiction because there was no bona fide claim for $3,000 or more, no diversity of citizenship, or no Federal statute or law involved.

May It Please the Court:

On the 25th day of March, 1943, Harper French filed the above entitled cause, at which time he fraudulently pretended that he was a brother and an heir of William Jeffries, Sr., and that he had loaned him $3,000.00, as set forth in the said complaint. He further fraudulently pretended that he was a resident of Detroit, Michigan, instead of Chicago, Illinois, his real residence, and thereby sought to obtain the jurisdiction of this Court.

On June 30, 1943, French appeared before the Master in company with Aiken, administrator *de bonis non,* a defendant and attorney for defendants, instead of Henry C. Ferguson who was presumed to be representing him, at which time he took the witness stand (Rec. 22) and testified that he was not a brother and that the Estate was not indebted to him in any sum or sums whatsoever and that the suit had been collusively and fraudulently filed, thereby destroying any jurisdiction that this Court may have had over him.

Henry C. Ferguson, as his attorney, moved to dismiss the case and George C. Adams, representing Nellie Jeffries, the defendant and counter complainant, moved to dismiss (Tr. 266). Mr. Aiken, a defendant, representing William Jeffries, Jr., one of the defendants and who had previously questioned the jurisdiction of the Court in his answer, objected to the motion of the plaintiff and the defendant and counter complainant, and the Master wrongfully sustained the objection thereby wrongfully forcing the case to trial before him, when it was very apparent the Court did not have jurisdiction.

On July 8, 1943, the administrator and William Jeffries, Jr., filed what purported to be a Counterclaim and Crossclaim (Tr. 128), thereby seeking to prevent the dismissal of the above entitled cause for lack of jurisdiction which had been destroyed by Harper French who testified the case was filed fraudulently.

On July 19, 1943, Nellie Jeffries moved to strike the Counterclaim and Crossclaim, which said motion was referred to the Master, over the objection of Nellie Jeffries (Tr. 134).

On August 10, 1943, Nellie Jeffries by petition asked leave to take the deposition of Dr. Abraham Fellman of Detroit, Michigan, who had previously signed an affidavit stating that Harper French, the plaintiff, was an incompetent person, that he suffered from tabes dorsalis and that his mental and physical condition were progressively getting worse and that he didn't know right from wrong (Ex. 2415A).

On October 7, 1943, a motion was made before the Honorable Philip L. Sullivan suggesting to the Court the feeble mindedness and insanity of Harper French and a motion to dismiss the suit because the Court did not have jurisdiction (Tr. 144), together with a petition of Nellie Jeffries (Tr. 145) to said motion. The motion

and petition were referred to Master McDonald, over the objection of Nellie Jeffries. Neither French nor his attorney Ferguson objected, but Aiken, administrator *de bonis non* and defendant, did. The Master who had received a large fee from Aiken rendered a report finding that the Court had jurisdiction, notwithstanding the fraud perpetrated upon the Court by Harper French, as above stated, and notwithstanding the fact that his physician stated that he was a feeble minded person (Tr. 178), to which objections were filed by Nellie Jeffries (Tr. 171). An order was entered on December 17, 1943, approving the said report and enjoining Nellie Jeffries from appearing in the Probate Court, or any other Courts, where she had a petition pending asking for an order compelling the administrator to file a current report and account, in pursuance to the Statute in such cases made and provided (Tr. 181). There was at that time also pending, an appeal in the Appellate Court from an order of the Superior Court of Cook County. A notice of appeal was filed from the order as to jurisdiction but was not perfected, inasmuch as the matter of the final testimony was still pending before the Court, and the Master again in his final report ruled that the Court had jurisdiction, to which Nellie Jeffries again filed objections, and this appeal was taken.

The Court was without jurisdiction because of the evidence given by the plaintiff, Harper French, a feeble minded man, which showed conclusively that there is not a diversity of citizenship or an amount of over $3,000.00 involved or a Federal question or that the claim arises under some law or Statute of the United States.

The Judicial Code Section 37, which is continued in effect by Civil Procedure Rule 12 (h), provides:

> "If in any suit commenced in a District Court, or removed from a State Court to a District Court of

the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, at that time said District Court shall proceed no further therein, but shall dismiss the suit or remand to the Court from which it was removed, as justice may require and shall make such order as to the costs as shall be just."

(A) If the defendant challenges the plaintiff's allegations of jurisdictional facts in any appropriate manner, the plaintiff must support them by competent proof and justify them by a preponderance of the evidence.

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. at 178, 189.

The burden of establishing the jurisdiction of the Federal Court is throughout the case, and is at all times on the plaintiff, and this burden never shifts.

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178.
KVOS v. *Associated Press*, 299 U. S. 269.

(B) The jurisdiction of a Court of the United States as a Federal Court in the strict sense, viz., as regards jurisdictional amount, diversity of citizenship and Federal question cannot be waived.

Pennsylvania v. *Williams*, 294 U. S. 176.
Gordon v. *Washington*, 295 U. S. 30, 35, 36.

(C) The plaintiff's good faith in choosing a Federal forum is open to challenge not only by resort to the face

of the complaint, but facts disclosed at the trial, and if from either source it is clear that this claim never could have amounted to the sum necessary to give jurisdiction, the case will be dismissed.

(D) To dismiss is the Court's duty under the act of 1875. In such original actions it may well be that the plaintiff and the defendant have colluded to confer jurisdiction by the method of one claiming a fictitious amount and the other failing to deny the veracity of the averment of the amount in controversy. Upon disclosure of that state of facts the Court should dismiss.

St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U. S. 283.

Operators Piano Co. v. *First Wisconsin Trust Co.*, 283 Fed. 904.

Hayward v. *Nordberg Manfacturing Co.*, 85 Fed. 4.

(E) The case should be dismissed if the evidence shows fraudulent statement of value to give jurisdiction or that the plaintiff cannot legally be permitted to sustain his claim.

North Pacific S. S. Co. v. *Soley*, 257 U. S. 216.

Horst v. *Merkley*, 59 Fed. 502.

Simon v. *House*, 46 Fed. 318.

North American Transport & Trading Co., 178 U. S. 262.

(F) For collusion in obtaining jurisdiction, Section 5 of the Act of 1875 says that the Court must guard itself against fraudulent collusion to obtain jurisdiction. This means combination of any kind by which jurisdiction is obtained fraudulently; and when the evidence discloses the fact; or where the ground on which jurisdiction is sought is frivolous or fictitious. The fraudulent making of parties is grounds of dismissing. When the case is dishonestly

brought to force a compromise, and the fact develops in the evidence it is the duty of the Court to exercise its power to dismiss.

Coffin v. *Haggin*, 11 Fed. 224.
Lehigh Min. & Mfg. Co. v. *Kelly*, 160 U. S. 342.
Cilley v. *Patten*, 62 Fed. 500.
Hayden v. *Manning*, 106 U. S. 588.
Marvin v. *Ellis*, 9 Fed. 367.

(G) Under Judicial Code Section 24, 28 U. S. C. A. Section 41, filing of counterclaim by the defendant of a suit does not give the Court jurisdiction of the suit not involving jurisdictional amount.

Home Life Insur. Co. v. *Sipp*, 11 Fed. 2d 474.
Industrial & Mining Guaranty Co. v. *Electrical Supply Co.*, 58 Fed. 732.

When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are of not sufficient value to support the jurisdiction, the case must be dismissed.

It is the duty of the Court, of its own motion, to dismiss a case, whenever it shall be made to appear that the facts upon which jurisdiction depends do not exist.

Horst v. *Merkley*, 59 Fed. 502.
Maxwell v. *Atchison, T. & S. F. R. R. Co.*, 34 Fed. 286.

The burden of establishing the jurisdiction of the Federal Court is throughout the case at all times on the plaintiff and this burden never shifts. Neither Harper French nor his attorney attempted to show the Court had jurisdiction, but on the contrary conceded the lack of jurisdiction, but Mr. Aiken assumed that obligation, notwithstanding the fact that he was the administrator of the Estate and attorney for a defendant; Mr. Aiken, the administrator

and a defendant, William Jeffries, Jr., a defendant and resident of Chicago and represented by Mr. Aiken and Mr. Clanton, Nellie Jeffries' former attorney, without diversity of citizenship and without any Federal question involved, attempted to show that the Court did have jurisdiction, notwithstanding the collusion and fraud, as above stated.

The Court wrongfully restrained Nellie Jeffries from demanding an accounting from Charles R. Aiken, thereby permitting him to collect large sums of money and spend them at his will, without an order of any Court or any other authority whatsoever (Tr. 196-7), (Rec. 1389, and particularly Rec. 1397-8), at which time he admitted giving checks to Master Charles A. McDonald (Rec. 1452-58). The administrator admitted that he had deposited the funds of the Estate in the checking account of Charles R. Aiken and Evelyn Aiken, his wife, at the Northern Trust Company (Ex. 2488 C) and had co-mingled the funds with his private funds, and that he had also deposited large sums of funds in the American National Bank and Trust Company in the partnership account of Aiken, McCurry, Bennett & Cleary (Ex. 2488 G). The evidence further showed that F. Harold Bennett, a law partner, was the only person who had a right to draw checks upon the said partnership funds (Rec. 1571). There was a balance in the account of $2,438.63. Aiken testified (Rec. 1391) about $1,200 belonging to Jeffries estate, and that (Rec. 1397) he paid the Master and others.

The account at the Northern Trust Company was in Charles R. and Evelyn P. Aiken (Rec. 1452). There was a balance of $3,000 belonging to the Estate (Rec. 1455) after he had paid various sums. There were several hundred dollars in the personal joint account belonging to the Estate (R. 1474), then three or four hundred, he didn't know.

A representative from the LaSalle National Bank produced the balance sheet showing a balance of $1,797.91 (Rec. 1545) and from the Northern Trust Company, showed a balance of $112.37 in the joint checking account, and $5 in their savings account (Rec. 1547-8).

The Court refused to restrain Mr. Aiken from further spending the money without a court order and referred appellant's petition to the Master who had received part of the money.

(H) The Circuit Court of Appeals was justified in failing to pass upon the motion to dismiss the appeal because it was predicated upon a supposed fraudulent decree entered December 7, 1944, without notice and upon fraudulent representation that it was by and with the consent of Nellie Jeffries and that the attorneys who O.K.'d the decree were representing her, when in truth and in fact it was by collusion and fraud, and a Bill is now pending in the nature of a Bill of Review to set aside the fraudulent decree and asking that certain of the defendants be held for contempt for attempting to perpetrate such fraudulent action. This matter was called to the attention of the Circuit Court of Appeals and they were furnished a photostat copy of the said decree exposing said fraud.

CONCLUSION.

WHEREFORE, respondent respectfully prays that the petition for certiorari be denied.

WILLIAM H. BECKMAN,
GEORGE C. ADAMS,
Attorneys for Respondent,
Nellie Jeffries.

DANIEL M. HEALY,
CHARLES F. HOUGH,
Of Counsel.

(12)

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Respondents.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

May It Please The Court:

Grounds For Review Are Conceded.

The respondents have attempted to answer but two of the grounds which support the instant petition.

Wholly unanswered, and therefore admitted, points are:

(1) The Court of Appeals should not have decided that a meritless claim cannot support the Federal jurisdiction (Petitioner's brief, pp. 18-21).

(2) Though jurisdiction cannot be conferred or waived by the parties, a counterclaimant by affirmatively invoking it is estopped from questioning the jurisdiction in an effort to escape an unfavorable judgment (Petitioner's brief, pp. 21-22).

(3) The Court of Appeals could not set aside a judgment which was not before it (Petitioner's brief, pp. 22-24).

(4) The Court of Appeals should not have finally disposed of the cause but ought to have remanded it for further proceedings in the District Court as required by statute (Petitioner's brief, pp. 26-27).

(5) The Court of Appeals as a court of equity upon review of a chancery proceeding should not have rewarded a party it found guilty of fraud (Petitioner's brief, p. 27).

Respondent's Argument Supports Principal Point of Petition.

Respondent's argument in defense of the decision below contains the following assertions calculated to justify the dismissal by the Court of Appeals for lack of jurisdiction instead of for want of equity (pp. 9, 11):

> "French . . . testified that he was not a brother and that the Estate was not indebted to him . . . thereby destroying any jurisdiction that this Court may have had over him . . .
>
> "The Court was without jurisdiction because of the

evidence given by the plaintiff, Harper French, a feeble minded man, which showed conclusively that there is not a diversity of citizenship or an amount of over $3,000 involved."

Counsel thus makes clear there is no contention that the plaintiff's complaint was contrived to invoke the Federal jurisdiction.

This Court has held that a claim dismissable under section 37 of the Judicial Code must be "colorable for the purpose of conferring jurisdiction". (*St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, 289.)

Respondent's argument shows, also, that the court below has ruled that the trial court may decide the merits in dismissing a cause for want of a substantial controversy.

Language in the dissenting opinion of *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, seems peculiarly applicable here (p. 79) :

> "The Court cannot resort to a decision of the merits of the case, over which it holds itself to be without jurisdiction . . . The measure of jurisdiction should be taken from the pleadings, unless the claims are frivolous on their face."

Respondents Seek To Bolster Dismissal By New Point.

Although conceding five of seven separate grounds for issuance of the writ, respondent now urges its refusal upon a completely new theory, one not considered by the Court of Appeals. Respondent here contends (p. 8):

> "The jurisdiction of the Court was excluded by the pendency of an action in the Probate Court of Cook County."

This position is the diametrical opposite of the view often taken by this Court. In *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, the Court said (p. 43):

> "The rule stated in many cases in this court affirms the jurisdiction of the Federal Courts to give relief of the nature stated, notwithstanding the statutes of the States undertake to give to State probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates."

The Answer Acknowledges Refusal By Court Of Appeals To Pass Upon a Controlling Question.

The petitioners made a formal motion, supported by separate briefs, to dismiss the appeal from the District Court on the ground it was moot. The Court of Appeals completely ignored the point and refused even to notice the motion.

By her answer in this Court respondent acknowledges the lower court's refusal to pass upon this controlling question. Respondent now states (p. 16):

> "The Circuit Court of Appeals was justified in failing to pass upon the motion to dismiss the appeal because it was predicated upon a supposed fraudulent decree."

The importance of this argument is its admission that such a question is present.

Those Who Seek To Villify Court And Counsel Have Nothing To Lose.

The serious accusations against the master in chancery and opposing counsel contained in respondent's brief are evident falsehoods. Counsel's motive in pursuing such

tactics is likewise plain. Denial, therefore, would bestow dignity where none now exists.

Indulgence in personalities and similar collateral attacks is an ancient device, often resorted to as a diversionary measure where issues cannot be met on their merits.

The brazenness with which claims of dishonesty, bribery, etc., are made in the case at bar is explained by this record. Counsel who hurl these vicious charges with apparent impunity are unscrupulous and irresponsible persons who have nothing to lose.

Mr. Adams, who along with Messrs. William H. Beckman, Daniel M. Healy and Charles F. Hough as counsel for Nellie Jeffries authored this vilification of Court and counsel, already stands convicted in this cause of even more reprehensible misconduct. In this connection we quote the following excerpts from the record appearing in the Master's Final Report (R. 220-222):

> "Although grave charges of embezzlement, fraud and other criminal conduct are made by Nellie Jeffries under oath in her countercomplaint against Draper & Kramer, Inc., a reputable real estate management firm, George C. Adams as her counsel casually announced at the hearings that he never contemplated making any proof of such charges (R. 1048-1049, 1057-1059).
>
> "At another stage of the proceedings Mr. Adams stated that he had 'enough nerve to not fear any consequences', that he had no fear of anything (R. 899).
>
> "Nellie Jeffries testified that she did not know anything about what Mr. Adams and Mr. Bruseaux put into the various pleadings which they filed for her (R. 2120-2121). She further testified that she made the following statement to George C. Adams her attorney (R. 2119):

> 'There is nothing I can tell you to put in that complaint. Whatever you want, you have to make it up yourself.'

"She said she told Mr. Adams after he had made up the countercomplaint (R. 2120):

> 'I don't know anything about this, whether it is true or not.'

"The record discloses in this connection that detective Bruseaux, Mr. Adams' office associate, acted as the notary public and certified that Nellie Jeffries appeared before him and swore that the contents were known to her and that they were 'true in fact and in substance'.

"Mr. Bruseaux testified that when he was first employed Nellie Jeffries asked him to find a brother of the deceased (R. 413)! Mr. Adams contended upon the trial of this cause that murder might be justifiable, and that his client 'was justified in anything that she did to preserve her rights' (R. 2030), and that she was justified in forging a will for her dead husband (R. 2032)!

"This unbelievable attitude of counsel, that the criminal activities in this litigation are warranted, appears from the following colloquy between counsel and the Master (R. 2028-2032):

> 'Mr. Adams: We shall attempt to show from the beginning of the world to the present time that he never had an estate and, therefore, she could not defraud him out of that he did not have. . . .
>
> 'Mr. Aiken: Now, even let us assume for the purpose of the discussion that counsel might show that from the beginning of the world down to the present time William Jeffries did not have lawful title to this estate, that would in no way excuse the criminal, unlawful conduct of these conspirators. . . .
>
> 'Mr. Adams: You might think so, but the Supreme Court has held otherwise, and there is not any exception to the rule, so that I know that

theory is right. . . . We offer the theory that she was justified in anything that she did to preserve her rights.

'The Master: That is rather a novel theory, that a person would be justified in committing a crime in order to protect her rights. That is something new to me.

'Mr. Adams: Here we have another theory, Judge. We have here a number of keen minded lawyers who enter into a conspiracy to cheat and defraud a woman out of her property, and she, in her way, as she seen it—

'The Master: Thought she would beat them by forging a will?

'Mr. Adams: —thought she would beat them out by presenting a will—yes, that is the idea.' "

Conclusion.

The resolution of conflicts of decision and the settlement of important principles of law called for upon this record justify a review of this cause on certiorari.

Respectfully submitted,

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